IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 46 of 2013

BETWEEN:

THE SHIP "GO STAR"
Appellant

and

DAEBO INTERNATIONAL SHIPPING CO LTD
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication of Submissions

I certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

1. The grant of special leave has been limited to a consideration of the *lex loci delicti* of the tort of inducing a breach of contractual relations. The choice of law rule in tort requires the forum court to apply the law of the place of the wrong, the *lex loci delicti*.

2. The issues for consideration by the Court are:

   (a) the identification of the relevant connection for the purposes of determining the place of the wrong for this tort; and

   (b) upon determination of (a), an application to the facts. For reasons that will be explained later in these submissions, even if the appellant satisfies the Court that the relevant connection for the tort is the place of breach of contract, it fails on the facts.

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3. The appellant's attempt to attribute the laws of the People's Republic of China to the tort of inducing breach of contract arises against the following facts:

(a) the party seeking to induce, the appellant, acted through its agent then located in Greece;

(b) the Greek party sought to induce by communication with a person then located in Singapore;

(c) the proper law of the underlying contract was the law of England;

(d) the parties to the underlying contract were both South Korean companies;

(e) the communication was directed at a payment obligation, that if performed, would have resulted in a payment being made in South Korea; and

(f) by virtue of (d) and (e), the loss which completed the cause of action was suffered in South Korea where the payment was not made.

4. The only factual connection to the People's Republic of China was that the ship the subject of the time sub-charterparty was located in Chinese territorial waters at the time the cause of action accrued.

Part III: Notice under section 78B of the *Judiciary Act 1903* (Cth)

It is certified that the respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth). The respondent has concluded that no such notice is necessary.

Part IV: Facts

5. The respondent does not dispute the appellant's factual narrative, and adds by way of supplement:

(a) the fleet manager and agent of the owners, Evalend Shipping Co CA ("**Evalend**"), carried on business in Greece and that Mr Pantelias acted on its behalf [FC23, CB246/30];

(b) the respondent was incorporated in South Korea [FC2, CB240/40];

(c) the counter party to the time sub-charterparty, Nanyuan Shipping Co Ltd ("**Nanyuan**") was also a South Korean company [FC3, CB240/50];

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(d) Nanyuan was obligated to make payments under the time sub-charterparty to the respondent's nominated bank account within 3 banking days of the vessel's delivery to Nanyuan [FC19, CB245/20]. By virtue of the fact that the "Go Star" was delivered to Nanyuan on 3 January 2009 (appellant's submissions paragraph 9), the payment was due on or before 7 January 2009;

(e) the respondent nominated, through its invoice (identified in paragraph 12 of the appellant's submissions) that payment was to be made at the location

20 described in paragraph 32 below; and

(f) at all relevant times Captain Hu was located in Singapore and communications were made with him there [TJ102, CB218/10].

Part V: Relevant Constitutional or Statutory Provisions

There are no directly applicable constitutional or statutory provisions.

Part VI: Argument

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6. ***Relevant connection***: Starting at a level of generality, the common law test for determining the place of the tort is "to look back over the series of events … and

ask … where in substance did this cause of action arise?"[1] This approach has been described[2] as ascertaining, in a commonsense way, what is the "place of the *act on the part of the defendant* which gives the plaintiff his cause for complaint".[3] The plurality in *Voth* at 567.8 made plain that both *Jackson* and *Distillers* focus attention on the act of the defendant, and not its consequences. This point of emphasis gives appropriate recognition to the fact that there are elements of tort that can be generally placed to one side as not being determinative of themselves of the place of tort, since their location is considered fortuitous. Commonly, for torts where economic loss is a necessary ingredient, the location of the happening of
10 damage is treated in this category.[4] Another, more specific example, is in the case of negligent misstatement; the place where the statement is acted upon may also be considered fortuitous.[5]

7. The focus on the place of activity of the tortfeasor is not to be applied uncritically, without regard to the particular type of tort under consideration.[6] In particular, an important consideration as to its application is whether the quality of the tortfeasor's conduct is crucial to its liability. In cases where that is a crucial feature of the tort (for example, the tort of negligent misstatement), the location of the tortfeasor's conduct ought be determinative.[7] In cases where the quality of the

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[1] *Distillers Co (Biochemicals) Ltd* [1971] AC at 468 ("*Distillers*"); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 ("*Voth*") at 567; *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; (2002) 210 CLR 575 ("*Dow Jones*") at [43]

[2] *Voth* at 567.7

[3] *Jackson v Spittall* (1870) LR 5 CP 542 ("*Jackson*") at 552

[4] *Distillers* at 467-468; *Voth* at 567; *George Munro Ltd v American Cyanamid and Chemical Corp* [1944] 1 KB 432 at 439, 441; *Buttigeig v Universal Terminal & Stevedoring Corp* [1972] VR 626 at 628.

[5] If the statement is directed at a recipient in another jurisdiction and intended to be acted upon there, the place of commission will be that place. If the statement is made local, that will be the place of commission, even if acted on elsewhere causing damage there: *Voth* at 568-9, explaining *Diamond v Bank of London and Montreal Ltd* [1979] QB 333 at 346 per Lord Denning MR and 349-350 per Stephenson LJ and *The Albaforth* [1984] 2 Lloyd's Rep 91 at 92 per Ackner and 96 per Robert Goff LJ

[6] *Dow Jones* at [28], [43]

[7] *Voth* at 567; *Dow Jones* at [43]

conduct is not of crucial significance (for example, the tort of defamation), the place of the tortfeasor's conduct is less likely to inform the *lex loci delicti.* [8]

8. This approach to the identification of the *lex loci deliciti* satisfies the consideration that reliance on the legal order in force in the jurisdiction in which people act or are exposed to the risk of injury gives rise to expectations that ought to be protected.[9]

9. For the tort of inducing breach of contractual relations, the breach of contract (the action of the induced party) is a necessary, but itself not sufficient basis for finding
10 liability against the tortfeasor. The gravamen of the tort is the intention of the tortfeasor.[10] The tortfeasor's intention informs the quality of the tortfeasor's act. The mere fact that a breach of contract may be the foreseeable consequence of action is insufficient to satisfy the mental element for the tort.[11] The tortfeasor's action must be directed at the contractual relations of the other parties. It may be sufficient if the tortfeasor, whilst not having a positive intention to interfere, acts with wilful blindness or indifference or reckless indifference to the contractual rights of the parties. It is not sufficient if the alleged tortfeasor is merely negligent or even grossly negligent.[12]

20 10. With this focus on the quality of the tortfeasor's conduct, it is submitted that the *lex loci delicti* is the location of place of action of the tortfeasor; where the inducement or procurement took place. Where, as in this case, one is concerned with communications that travel across space and time, they are to be treated where they are received (or at least where they could be reasonably anticipated to be

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[8] *Dow Jones* at [25], [26], [44]

[9] *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA, (2000) 203 CLR 503 at [75]

[10] *Lumley v Gye* (1853) 2 El & Bl 216; 118 ER 749; *Short v City Bank of Sydney* (1912) 15 CLR 160; *Allstate Life Insurance Company v Australia and New Zealand Banking Group Limited* (1995) 58 FCR 26 at 43; *Fightvision Pty Ltd v Onisforou* [1999] NSWCA 323, (1999) 47 NSWLR 473 at [251]; *Sanders v Snell* [1998] HCA 64, (1998) 196 CLR 329 at [22]-[26]; *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1 ("*OBG*") at [41]-[43], [191]-[192]; *LED Technologies Pty Ltd v Roadvision Pty Ltd* [2012] FCAFC 3, 199 FCR 204 ("*LED Technologies*") at [41]-[54]

[11] *OBG* at [42]-[43] per Lord Hoffman, cited with approval in *LED Technologies* at [52]

[12] *British Industrial Plastics Ltd v Ferguson* [1940] 1 All ER 479; *OBG* at [39]; *LED Technologies* at [50]

received[13]); and it is in that place where the tortfeasor ought to be treated as having acted.[14]

11. The approach of determining the *lex loci delicti* by reference to the place of action of the tortfeasor is the approach adopted by both the trial judge and the Full Court. The difference in result between them was simply the identification of acts that induced Nanyuan (the counter party to the time sub-charterparty with the respondent) to conduct itself in breach of the time sub-charterparty. The trial judge considered the relevant communications were with Ms Chen (located in the People's Republic of China). The Full Court reversed that finding and determined that the relevant communications were with Captain Hu (located in Singapore) [FC86-87, CB264/10-30].[15]

12. The Full Court made findings that Evalend (the fleet manager and agent of the owners), carried on business in Greece and that Mr Pantelias acted on Evalend's behalf [FC23, CB246/30]. It found that Mr Pantelias knew of the Nanyuan sub-charterparty and of its requirements that Nanyuan pay charter hire and other moneys to the respondent. It also found that Mr Pantelias knew that if Nanyuan did not pay money to the respondent as and when due Nanyuan would breach the sub-charterparty and the respondent would suffer financial loss. The Full Court found that Mr Pantelias on four occasions urged Nanyuan by email and twice by conversations with Captain Hu, not to pay charter hire and any other money due to the respondent under the Nanyuan sub-charterparty [FC90, CB265/30]. It found that by this urging, Mr Pantelias sought to persuade Nanyuan not to pay what was then due to the respondent under the Nanyuan sub-charterparty. It was coupled with an assertion that the owners could make Nanyuan pay them a second time any sums Nanyuan might pay the respondent under the Nanyuan sub-charterparty. The Full Court found that both of those bases on which the appellant sought Nanyuan to act had no legal justification. The Full Court found that both bases were calculated

[13] *Voth* at 568.7

[14] *Voth* at 568, 578-579

[15] The trial judge found that Captain Hu was in Singapore and that the communications with him occurred in Singapore [TJ102, CB218/10]

to, and did, induce Nanyuan to breach its obligations to pay hire and for the value of the bunkers on delivery of the "Go Star" as due under the Nanyuan sub-charter [FC93, CB266/10].

13. As mentioned above, the Full Court found that the relevant inducement/procurement occurred where Captain Hu received the communications. That was in Singapore. The appellant did not adduce evidence of the law of Singapore, with the consequence that the Full Court applied Australian law and determined that the appellant was liable in tort to the respondent.

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14. ***Consideration of recent theories***: With the recent trend toward disentanglement of the economic torts of inducing/procuring breach of contract and interference with economic relations, two principal theoretical approaches to aspects of the tort have emerged. For the reasons that follow, neither is entirely satisfactory.

15. The first is the theory, most notably identified in *OBG*, that the tort is a species of accessorial liability.

16. This theory is explained through the observations of Lord Hoffman and Lord
20 Nicholls (with whom Lords Walker and Brown and Baroness Hale generally agreed) in *OBG*. The relevant passages of Lord Hoffman's speech are to be found at [3]-[5] and [39]-[44]. The latter paragraphs emphasise the importance of knowledge to the establishment of the tort; a view that is consistent with the importance of the character of the tortfeasor's conduct. The last of those paragraphs ([44]) is related to paragraphs [3]-[5]. Proceeding on the basis that there ought not be a aggregation of economic torts, Lord Hoffman observed that the tort of procuring/inducing breach results in liability of an accessorial kind to the liability of the contracting party in breach. Hence his comment "[n]o secondary liability without primary liability". Lord Nicholls (at [168]-[173]) also recorded
30 that in relation to the tort of procuring breach, the tortfeasor is responsible for the third party's breach of contract that it procured. He described the tort as an example of civil liability which is secondary, in the sense of being supplemental, to that of the third party who committed the breach of contract.

17. The most significant problem with strict acceptance of the accessorial theory is that it presumes that the damages available against the tortfeasor are to be the same as the damages available against the contract breaker. That is not necessarily so. A number of cases have proceeded on the basis that damages available against the tortfeasor may be calculated on a different basis and may be greater than those recoverable from the contract breaker.[16] For at least this reason the theory is an inexact one.

18. In any event, the attribution of liability of the contract breaker to the tortfeasor, rather than the contract breaker's actions, does not point to the place of breach of the contract breaker as the *lex loci deliciti* of the tort. Rather, if one were to stray from the act of the tortfeasor, this theory may promote the law that would determine the contract claim, the proper law of the contract, as being the appropriate touchstone for determining the liability of the tortfeasor. That law is not necessarily the place of breach (particularly in relation to international contracts), but, at common law, the place with which the contract has its closest and most real connection;[17] or its "natural seat of centre of gravity".[18] The test gives primacy to the personal choice of the contracting parties, or in the absence of choice by them, other connecting factors, such as the places of residence or business of the parties, the place of contracting, the place of performance and the nature and subject matter of the contract.[19] It follows that if the Court were to focus on the tort being a species of accessorial liability, it would not commend the situs of the contractual breach as the *lex loci delicti*.

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[16] see, for example, *Lumley v Gye* (1853) 2 El&Bl 217, 118 ER 749 at 754 per Compton J and 756 per Erle J; see also the discussion in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636 at 645-649. Also, in *Drouillard v Cogeco Cable Inc* (2007) 282 DLR (4th) 644 at [42]-[43] damages for the tort were described as "at large" (in the sense described by Lord Halisham in Broome v Cassell & Co Ltd [1972] AC 1027 at 1073G).

[17] *Bonython v The Commonwealth* (1950) 81 CLR 468 at 498; see also *Akai Pty Ltd v People's Insurance Co Ltd* [1996] HCA 39, (1996) 188 CLR 418 at 434 ("Akai")

[18] *Akai* at 437, citing Cheshire and North, *Private International Law*, 11th ed (1987) p 450

[19] *Akai* at 437

19. The second theory espoused as having relevance to the tort can be found in this Court's consideration of the defence of justification in *Zhu v Treasurer of New South Wales*.[20] In that case the Court was not so much concerned with the general theory of the tort but was explaining the principled approach to the defence. In *Zhu* the Court emphasised that recourse to the defence was not dependent upon a discretionary balancing of social and individual interests, but required the identification of the exercise of a superior legal right. For this purpose, the Court embraced the "quasi-proprietary right" thesis of Kitto J in *Attorney-General (NSW) v Perpetual Trustee Co Ltd*,[21] and applied it to the superior rights analysis of Jordan CJ in *Independent Oil Industries Ltd v Shell Co of Australia Ltd*.[22]

20. It is submitted that it is not appropriate to use the reasoning from that case as a sound doctrinal basis for determining the *lex loci delicti* of the tort. Kitto J's thesis, whilst useful to explain a principled approach to the defence of justification, has plain limitations that make it difficult to attribute generally to the tort, and to the identification of location.

21. The first is that, as the Court noted in *Zhu*,[23] Kitto J's thesis has an element of circuity, insofar as the right to protection arises through the classification of in personam rights as "quasi-proprietary" rights (in respect of strangers to the contract), but that the touchstone of the rights being "quasi-proprietary" is that they are deserving of protection from interference. The second[24] is that the Court recognised that "quasi-proprietary" rights do not have all of the characteristics of property rights, and that their principal, but not always sole, characteristic is that they are protected from third party interference. This limitation points to the difficulty in approaching location by reference to an analysis of where the "quasi-property" is located, as though it was property. An analysis of the location of a

[20] [2004] HCA 56; (2004) 218 CLR 530 at [123]-[124]

[21] (1952) 85 CLR 237 at 294-295

[22] (1937) 37 SR (NSW) 394 at 415 ff

[23] [2004] HCA 56; (2004) 218 CLR 530 at [125]

[24] [2004] HCA 56; (2004) 218 CLR 530 at [125]

contractual right is recognised as one of artificiality. [25] The third is that is the tort was to be considered an analogue to interference with property rights, it would be difficult to maintain a position that the right was not also protected from negligent interference.

22. These conceptual difficulties point against a property analysis being an appropriate touchstone for identification of the *lex loci delicti*.

23. ***Metall und Rohstoff***: the appellant seeks support from the English Court of Appeal's decision in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*[26] In a short analysis, and applying the "substance" test, Slade LJ considered that test required him to look more broadly than where the acts of inducement took place; and determined that he needed to take into account the location of the breach and the place of resulting damage.[27] Slade LJ therefore focused on the location of the second and third elements of the tort, as described by him – the place of breach so induced and the place of resulting damage to the innocent party. He did not descend to one criterion but took a broad brush approach to the case before the Court. The broad approach adopted did not involve any analysis of the elements of the tort so as to identify why some elements, and not others, are relevant to determining the *lex loci deliciti*. In particular, Slade LJ gave no consideration to the importance of the quality of the actions of the tortfeasor, and did not attempt to carefully analyse the nature of the tort.

24. It is submitted that this decision takes the required analysis no further. It could equally be said that the two elements chosen by Slade LJ – the location of where the induced party acts (like the place where a party acts upon receipt of negligent advice) and the location where loss is suffered, are matters of fortuity. Indeed one could well foresee, particularly in the context of international contracts where the performance may be undertaken in various jurisdictions, a single inducement could

[25] *Haque v Haque (No 2)* (1965) 114 CLR 98 at 136 per Windeyer J

[26] [1990] 1 QB 391

[27] [1990] 1 QB 391 at 449C-D

lead to breach in numerous jurisdictions. One could end up with the peculiar outcome that the same act of inducement could be both actionable in respect of certain breaches and not actionable in respect of others. Further, to the extent actionable, one could end up with conflicting bodies of law having application. That outcome would avoid, rather than promote, certainty and simplicity in the application of choice of law rules.[28]

25. ***Current overseas position***: there are problems in seeking aid from the approach now taken in the United States and England, since both jurisdictions apply prescribed criteria calling for their own evaluative judgment.[29]

26. ***Practical issues***: the appellant submits that the identification of the *lex loci delicti* by reference to the place of inducement, is conducive of haphazard results. The submission seems to be that the location of the person induced may be uncertain at the time of the inducement. The premise of the argument is misplaced, to the extent that the place of communication may, for the purposes of the tort, be the place where the statement ought reasonably be expected to be received.[30] In any event, the criticism is directed at the usual rules that apply to communications across space and time, not at the principles applicable to the tort. Using the appellant's example, assuming that the communication would be treated as being made in Iceland (rather than Singapore where Captain Hu was ordinarily located, and where the server applicable to his email address was located) the fact that application of those rules means that the appellant is treated as acting in Iceland (in the same way it would be if Mr Pantelias was physically present in Iceland) hardly

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[28] This being the object: *Zhang* at [66]; *Neilson v Overseas Projects Corp (Vic) Ltd* [2005] HCA 54; (2005) 223 CLR 331 at [13], [89]-[91] ("Neilson")

[29] The determination of choice of law in the United States is largely governed by the operation of the *Restatement of the Law (Second) Conflict of Laws*. The Restatement, at s 145 adopts a "significant relationship" test that is informed by a prescribed shopping list of matters to be considered. The choice of law is determined by reference to the operation of Part III of the *Private Internatonal Law (Miscellaneous Provisions) Act 1995*. In *Marin v Bonhams & Brooks Ltd* [2004] 1 All ER (Comm) 880 at [17], [18], Mance LJ considered it inappropriate to construe the operation of the "new principles" prescribed by the statute by reference to what he described as "increasingly outdated debate about the precise nuances of the old law."

[30] *Voth* at 568.7

renders the result any more haphazard. The difficulties in proof are also not a proper basis for selection of choice of law rules.

27. ***Application of the facts***: there was no agreement at the trial on what was the law to be applied to the tort claim. The parties proceeded on the conventional basis that, absent proof of, or agreement about, foreign law, the law of the forum was to be applied.[31] The appellant proved the law of the People's Republic of China; essentially to establish that at the time of the events in question, that law did not recognise the tort.

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28. How this matter was developed at trial requires some understanding of the pleadings. The respondent contended that the communications from the appellant asserted a lien and directly requested that payments not be made. This was contended to be a knowing inducement to "breach the .... charterparty" (FRSC para 14, CB4/30). The respondent also contended that "acting and induced by the request ... and the assertion of a lien ..." Nanyuan: (a) failed to make payment (FRSC para 15(a), CB5/20); and (b) gave notice of cancellation, and thereby repudiated the charterparty (FRSC para 15(b), CB5/30). In the Further Re-Amended Defence the appellant contended: (a) the correspondence was received
20 by Nanyuan in the People's Republic of China (para 18, CB13/40); (b) "[f]urther and in any event, to the extent that [Nanyuan] was *induced to act to cancel and repudiate* the [Nanyuan] Sub-Charterparty as alleged in paragraph 15(b) of the Statement of Claim (which is not admitted), such action occurred while the Ship was within the territorial waters of the People's Republic of China ..." (para 18A, CB13/50). It was for these reasons that the law of the People's Republic China was claimed to be the proper law (para 19, CB14/10). In the Second Further Re-Amended Reply, paragraphs 18 and 18A of the defence were not admitted and paragraph 19 was denied, with reference being made to the communications with Captain Hu in Singapore (para 14, 15, CB4/5).

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29. By reference to these pleadings, the appellant sought to establish two relevant connections to the People's Republic of China - the place of inducement and the

[31] *Neilson* at [115], [116]

place of alleged repudiation. It never contended that the failure to make payment itself had connection with the People's Republic China. It also did not contend that the proper law of the sub-charterparty was that of the People's Republic of China.

30. The fact that the appellant did not allege the failure to make payment had relevant connection to the People's Republic of China is explained by the content of the time sub-charterparty entered into by the respondent and Nanyuan.

31. The terms of that time sub-charterparty included (a) cl 31, that Nanyuan were to take over and pay together with the first hire payment bunkers upon vessel's delivery [FC17, CB244/50]; and (b) that payments were to be made to the respondent's nominated bank account within 3 banking days of the vessel's delivery to Nanyuan [FC19, CB245/30]. The facts below also included findings that (a) the respondent delivered the ship to Nanyuan at Shanghai on 3 January 2009 [FC4, CB241/10]; and (b) on 4 January 2009 the respondent issued an invoice for the first hire payment and for the bunkers to Nanyuan [FC4, CB241/10]. The relevance of these terms is that the payment obligation recorded in the time sub-charterparty was one that needed to be met on or before 7 January 2009 (if on the proper construction of the word "within", one excludes the day of the event triggering the commencement of time running).

32. The terms of time sub-charterparty identified that the respondent would nominate its bank account into which payment was to be made [CB129/50]. The nomination was not recorded in the time sub-charterparty. The nomination is recorded in the invoice issued on 4 January 2009 [CB140]. This nomination is not expressly recorded in the reasons below (explicable by the fact that both Courts below determined the issue of *lex loci delicti* by reference to the place of inducement). The invoice nominated the respondent's bank account at the bottom of the invoice [CB140/30-40]:

KOREA EXCHANGE BANK, KWANG HWA MUN BRANCH
IN FAVOUR OF DAEBO SHIPPING CO., LTD
SWIFT CODE: KOEXKRSE
ACCOUNT NO. 118-JSD-100260
BENEFICIARY: DAEBO SHIPPING CO., LTD

33. The nomination was of an account held at a branch located in South Korea, the country of incorporation of the respondent [FC2, CB240/40]. Nanyuan is also a South Korean company [FC3, CB240/50].

34. The appellant has not sought to rely upon the proper law of the time sub-charterparty as a basis for determining the *lex loci delicti* of the tort. The time sub-charterparty recorded that "English Law to Apply", which reflected the fact that it also made provision for the seat of arbitration being in London.

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35. In a case where the breach of contract consists of non-payment of a debt, the place of breach is the place where, on the construction of the contract, the payment is to be made.[32] If the contract makes no provision, there is a presumption in favour of the place where the creditor normally resides or has a principal place of business.[33] In this case, the sub-charterparty provided for payment to a nominated account, and an account was nominated at a branch in South Korea. The creditor was also incorporated in South Korea. On the application of either rule the rule of breach or the presumption, the breach of payment obligation is to be taken as occurring in South Korea.

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36. The Full Court found that the relevant procurement concerned the payment obligations (charter hire and other obligations), and tied that to the breach of that obligation [FC90-93, CB265-266]. For reasons just mentioned, that was an obligation that was to be performed in South Korea, not the People's Republic of China.

37. The appellant appears to accept that the relevant breach of contract was the failure to pay money when due, but seeks to rely upon an asserted repudiation of the sub-charterparty by emails of 8 [CB175] and 13 January 2009 [CB184] as

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[32] *Gosman v Ockerby* [1908] VLR 298 at 305-6; *Earthworks and Quarries Ltd v F T Eastment & Sons Pty Ltd* [1966] VR 24 at 26-7; *Sydbank Soenderjylland A/S v Bannerton Holdings Pty Ltd* (1996) 68 FCR 539 at 549A-B; Nygh's Conflict of Laws in Australia (8th ed, LexisNexis 2010) at [3.61]

[33] *Earthworks and Quarries Ltd v F T Eastment & Sons Pty Ltd* [1966] VR 24 at 26

demonstrating that Nanyuan had no intention of paying any money when due [appellant's submissions para 81]. The appellant also claims that this repudiation also meant that it did not load the ship in the People's Republic of China [appellant's submissions para 82]. It is also said that it was in the People's Republic of China that Nanyuan ceased to perform the sub-charter and, in effect, sought to return the ship [appellant's submissions para 83]. In terms of the matters identified in paragraphs 82 and 83 of the appellant's submissions, it is relevant to note the finding of fact of the trial judge and the Full Court that only "by 8 January 2009" had the "Go Star" reached the loading port and was awaiting instructions as to the loading of her cargo [TJ33, CB204/30] [FC29, CB248/30]. Necessarily, the events described could only occur after there had already been a breach of the payment obligation by Nanyuan.

38. There are a number of obvious problems with this attempt to connect the tort of interference to People's Republic of China:

(a) First, on the findings of fact of the Full Court, Nanyuan was in breach of the relevant payment obligation by failing to make payment on or before 7 January 2009. It was at that point that the cause of action in tort accrued, on the basis that the respondent suffered damage from the point in time it was not paid. That occurred prior to either of the communications said to amount to repudiatory conduct, or the attempts to withdraw from the time sub-charter (each of which occurred, at the earliest on 8 January 2009).

(b) Secondly, there is no finding either at first instance or on appeal that the appellant intended to bring about a repudiation of the Nanyuan sub-charter. Indeed, the terms of the communications suggest to the contrary. The substance of the communications were: (a) advice that the Owners were considering their position under the head charter; (b) emphasising that they were only asking Nanyuan to withhold payments; and (c) requesting the withholding of payments. The only express reference to repudiating the sub-charterparty is one in which the appellant was emphasising that this is not what it was seeking to procure. That email from Mr Pantelias to

Captain Hu (recorded in the reasons of the trial judge [TJ27, CB203/30] and the Full Court [FC25, CB247/30]) relevantly recorded:

We refer to our phone conversation a short while ago and we simply wish to ensure that our message is read once again very carefully and to respectfully urge you to take legal opinion before you take any decisions and you act upon them. In our message we advised you that we are considering with the physical owners their options including but not limited vessel's withdrawal from Head charterer's service. The vessel however has not been withdrawn and if you proceed and throw up your charter with your Owners you may be held in repudiatory breach of your charter and expose your selves to damages. We have simply asked you to withhold payments under your charter. In other words our last must be seen as a notice of lien and no more.

We reiterate that we have nothing to share with your good selves and we regret that we have to deal in this situation which of not of our making.

Once again we wish to ensure that our suggestions are put forward with utmost respect and we wish to ensure that we do not run into any conflict of interest between ourselves and be on the same side of the fence.

The result is that there is no relevant relationship between the communication from the appellant and any alleged repudiatory conduct.

(c) Thirdly, the reliance of the appellant to Nanyuan's decision to not load requires consideration. It is accurate to note that the trial judge attributed to Mr Pantelias a desire that Nanyuan not load the "Go Star", because that would facilitate easier withdrawal of the vessel by the appellant if it chose that course [TJ 92, CB215/50; TJ99, CB217/30]. However: (a) one is concerned with a time sub-charterparty, not a voyage sub-charterparty.

There is no obligation for a time charterer to load (cf a voyage charterer's obligation); (b) it never formed part of the respondent's pleaded case that there had been a breach of the time sub-charterparty occasioned by Nanyuan failing to load in a timely fashion; (c) there was never a claim maintained by the respondent that it had suffered loss as a result of Nanyuan's failure to load. In short, this is an irrelevancy to the claim in tort. The Full Court placed no weight on this matter in determining the appellant liable.

(d) Fourthly, even if one could construe the conduct of Nanyuan on and after 8 January 2009 as being repudiatory in nature, that conduct was never accepted by the respondent; that is, it never elected (by acceptance of the Nanyuan's conduct) to terminate the contract, and thereby treat the contract as at an end. Further, such conduct, if accepted and relied upon as a basis to terminate, cannot affect the pre-existing accrued right to payment; with the consequence that proper focus would remain on the accrued breach of payment obligation.

(e) Fifthly, as paragraph 81 of the appellant's submissions makes plain, the appellant still needs to tie the alleged repudiation to the intention to not meet payment obligations. That this remains the focus of the claim makes the point that it adds nothing to the fact that payment was not made where required.

39. For these reasons, even if the Court were to find that the *lex loci delicti* is the place of breach of the underlying contract, the appeal ought to fail.

Part VII: Notice of Contention or Cross-Appeal

Not applicable.

Part VIII: Time Estimate

The respondent estimates that it will require 1-2 hours to present its oral argument.

Dated 6 November 2013

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